Supreme Court, U.S.
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No. 88-1507

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

ELAINE MOTT,

Petitioner,

v.

GERALD C. KERNS, et al,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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34 pp

COUNTERSTATEMENT OF QUESTION

WHETHER FEDERAL CONSTITUTIONAL PRINCIPLES REQUIRE REVIEW IN THIS FORUM WHERE PETITIONER'S CIVIL RIGHTS ACTION WAS DISMISSED FOR FAILURE TO PROSECUTE IN ACCORDANCE WITH FEDERAL RULE OF CIVIL PROCEDURE 41(b) AND LINK v WABASH R CO, 370 US 626 (1962).

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OPINIONS BELOW

Respondents accept Petitioner's Statement of Opinions Below.

JURISDICTION

Respondents accept Petitioner's Statement of Jurisdiction.

COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case does not accurately portray events leading to her Petition for Writ of Certiorari. The following is an accurate summary of proceedings to date:

Petitioner is Elaine Mott of Gary, Indiana. At the time of the incident giving rise to her Complaint, Petitioner was married to William Mott, M.D. Dr. Mott was plaintiff in litigation based on the facts currently before this Court. See Mott v Kerns, et al, USDC ED SD Docket No. 84 CV 4180 DT. Dr. Mott's case was tried to a no cause for action verdict in December, 1987. Dr. Mott's case was not appealed.

Petitioner seeks review of a trial court dismissal dated November 28, 1987, and an Opinion of the United States Court of

Appeals for the Sixth Circuit, dated October 10, 1988.

Respondent Michigan Department of State Police is a duly created agency of Michigan government. MCL 16.250; MSA 3.29(10). Respondent Gerald Hough was the Director of the Michigan Department of State Police. Respondent Hough, at the time of this incident, was the highest ranking official in the Department of State Poiice.

Respondents Michael Stamm and Gerald Kerns are Michigan State Police Troopers. At all times pertinent to this case, Respondents Stamm and Kerns were assigned to Post #51, Paw Paw, Michigan.

A six count Complaint and Jury Demand was served on Respondents in October, 1984. The Complaint named William and Elaine Mott as party Plaintiffs. The Complaint alleged violation of 42 USC § 1983 in Count I, and

five pendent State common law counts alleging assault and battery, false arrest and imprisonment, negligence, malicious prosecution, and loss of consortium.

Respondents answered the Complaint December 3, 1984. No amendment to the Complaint was ever filed.

On January 10, 1985, the Honorable Ralph B. Guy, United States District Judge, issued a Master Opinion dismissing all pendent State common law claims in the Complaint without prejudice. Counts II through VI were thus dismissed.

In April, 1985, the parties commenced discovery. Depositions of Mr. and Mrs. Mott were scheduled. Despite Respondents' repeated efforts, Petitioner refused to appear for her scheduled depositions. Depositions were scheduled May 7, 1985, May 9, 1985, May 22, 1985 and May 30, 1985.

Petitioner offered no explanation for her failure to appear on these occasions.

Attorney Alan Hunt moved to withdraw his representation of William and Elaine Mott in July, 1985. On July 31, 1985, Judge Guy issued an Opinion permitting withdrawal. The Court's Order stated, in pertinent part:

> "Mr. Hunt also asked for a six month extension of the discovery cut-off date, the due date of the pre-trial order and the final pre-trial conference date. The Court finds that it cannot set new dates until Plaintiffs are represented by new counsel. Accordingly;...
>
> "It is further ordered that Mr. Hunt inform his clients of the Court's decision on this motion by way of sending them a copy of the Court's Order.
>
> "It is further ordered that Plaintiffs be allowed thirty (30) days from the date of this order to secure counsel to represent them in this matter and that, during that thirty days, no dispositive action shall be taken against them.
>
> "Further, in the event that Plaintiffs do not secure counsel within thirty (30) days, or indicate to this Court their desire to proceed in pro per, the Court will entertain a motion for dismissal by Defendants." (Emphasis added)

William and Elaine Mott v Gerald Kerns, et al, USDC ED SD Docket No. 84 CV 4180 DT, Order Granting Motion for Leave to Withdraw as Counsel for Plaintiffs, Ralph B. Guy, Jr. July 1, 1985.

Despite the foregoing Order, Petitioner was not heard from as a meaningful participant in the litigation until an attorney filed an appearance on her behalf October 9, 1986.

After Judge Guy's July 31, 1985 Order, a dispute arose as to Attorney Hunt's fees. The attorney representing William Mott in his divorce action appeared in the Federal Court and objected to attorney fees being tendered to Alan Hunt. A Motion for Reconsideration of Judge Guy's Order was filed by Mr. Mott August 1, 1985. Oral argument on Mr. Mott's Motion was heard September 12, 1985, before Honorable Virginia M. Morgan, U.S. Magistrate. At this hearing, Mr. Sherman Sharpe appeared

for Doctor Mott. Attorney John Bredell, who represented Mrs. Mott in her divorce action, appeared for Petitioner. Mrs. Mott did not file any documents prior to the hearing. At the hearing, Mr. Bredell stated he was Mrs. Mott's divorce attorney and that he objected to Mr. Sharpe's appearance on behalf of Mrs. Mott. There was no indication from Mr. Bredell that he was representing Mrs. Mott's interests in the instant civil litigation. Mr. Bredell stated that since Mr. Sharpe was representing Mr. Mott in the divorce case, he (Mr. Sharpe) could not represent Mrs. Mott in a civil action. Mr. Sharpe agreed. Mr. Bredell stated at the hearing that Mrs. Mott had an interest in proceeding with her civil claim against the Michigan State Police. No appearance was filed on Mrs. Mott's behalf, however, until October 9, 1986.

The case remained essentially quiescent between August, 1985 and June, 1986. During this time period Plaintiff William Mott resolved his counsel issues and retained attorney Sherman Sharpe. Petitioner did not appear via counsel and gave no indication she desired to proceed with the case.

Status conferences were held with the Honorable Barbara Hackett on June 6, 1986 and October 2, 1986. Petitioner did not appear at either status conference, nor did she provide written materials requested in the court's pre-trial orders. Discovery was open between June 6, 1986 and October 2, 1986. Petitioner did not participate in discovery during the June 6 to October 2, 1986 time period. Mr. Mott's attorney frequently conferred with Respondents about the case between Judge Guy's July 31, 1985 order and October, 1986. Petitioner was not

heard from until October, 1986. In September, 1986, Respondents were contacted telephonically by Petitioner's attorney, John Bredell, who inquired of Respondents' counsel whether Elaine Mott's case was worth anything. Mr. Bredell acknowledged his awareness of a scheduled October 2, 1986 pre-trial conference during this conversation. Despite this awareness, Petitioner did not appear at the conference on October 2, 1986 with Judge Hackett.

After filing her appearance on October 9, 1986, Petitioner filed a Notice of Taking Depositions of Respondents Stamm and Kerns. Respondents objected, stating that depositions of Troopers Stamm and Kerns had been taken and that additional depositions were inappropriate. The following are excerpts from Petitioner's response to Respondents' objection:

"In January of 1984, approximately two months after the criminal charges were dismissed, Elaine Mott separated from her husband and moved to Indiana. In July of 1984, Plaintiff filed a Complaint for Divorce. Sometime during this period, Doctor Mott retained the services of an attorney Alan Hunt, the attorney who filed the instant lawsuit. Elaine Mott was not present at the initial consultation between her husband and Alan Hunt.

"The instant lawsuit was filed in September of 1984 on behalf of both Doctor and Mrs. Mott. Although Elaine Mott was named as a Plaintiff, she never had an opportunity to consult with Alan Hunt prior to said Complaint being filed, never signed any type of fee agreement with him and has only recently read the Complaint filed on her behalf. The deposition of Troopers Stamm and Kerns were taken March 13, 1985. Elaine Mott was not present for those depositions and had never spoken to Hunt prior to said depositions. Because Elaine Mott never had an opportunity to speak with Alan Hunt regarding the facts of this lawsuit, she had no input in the cross-examination of Troopers Stamm and Kerns. Alan Hunt did not have an opportunity to speak with Elaine Mott until the Fall of 1985, after he had withdrawn as counsel.

* * * *

"The Defendants are incorrect in their assertion that Plaintiff Elaine Mott is attempting to depose Defendants Stamm

and Kerns for a second time. Plaintiff Elaine Mott's interests have been completely unrepresented during the pendency of this cause until October 6, 1986, when her present attorneys filed an appearance of her behalf.

"When Alan Hunt filed the Complaint on behalf of Elaine Mott and Doctor Mott, he did so at the request of Doctor Mott. As stated above, Elaine Mott never hired Alan Hunt, never related her version of the incident, never described her damages, and never even spoke to Attorney Hunt while he was attorney of record in this cause. It cannot be assumed or alleged that Doctor Mott was acting as a conduit between Attorney Hunt and Elaine Mott because a mutual restraining order from the Washtenaw County Circuit Court barred the Motts from attempting to communicate with each other. At the time Officers Stamm and Kerns were deposed, Elaine Mott had been divorced from Doctor Mott for over two months and the Motts were clearly two separate parties.

* * * *

"When Alan Hunt moved to withdraw from this case, he and Defendant Doctor Mott had a dispute as to the cause of the attorney-client breakdown. Alan Hunt accused Doctor Mott of not contacting Elaine Mott regarding the litigation and Doctor Mott accused Alan Hunt of the same charge. But, neither of them ever claimed that Elaine Mott was at fault for not communicating with Attorney Hunt. Elaine Mott did not communicate

with Alan Hunt because she did not know about him, did not know he filed a complaint on her behalf, and did not know he purported to be her attorney." (Emphasis added)

Plaintiff Elaine Mott's Response To Defendants' Motion For Protective Order, November 7, 1986, pp 3-6.

Respondents interpreted the foregoing as a renunciation of Petitioner's alleged complaint and her alleged attorney.

On November 25, 1986, Petitioner was dismissed from this case. The essence of Judge Hackett's ruling is contained on Page 3 of her Order:

"The Court can only conclude that Alan Hunt never had authorization to file suit on behalf of Elaine Mott. It may have been due to a misunderstanding on counsel's behalf, or a missed communication, but it is clear that Elaine Mott was not properly named a party. When this fact became clear, the caption of this case should have been changed to correct the error. The Court cannot allow Elaine Mott to 'pick up' a lawsuit which she did not authorize or initiate."

84 CV 4180 DT
Order Dismissing Elaine Mott, November 26, 1986, Honorable Barbara K. Hackett, p 3

Petitioner filed a letter request for reconsideration of the dismissal on December 12, 1986. Respondents filed a response to the letter request on December 29, 1986.

The district court issued a final judgment January 20, 1987. In dismissing Petitioner's claim, Judge Hackett stated:

> "Elaine Mott's present request ignores several salient facts. She has previously and emphatically disavowed the original complaint filed by Alan Hunt in September, 1984. Moreover, she has insisted that she was not represented in this matter until October 6, 1986. In his Notice of Appearance her counsel failed to adopt the original complaint. Finally, no subsequent complaint has been filed on her behalf.
>
> "This Court concludes, therefore, as follows: (1) Elaine Mott cannot now be 'renamed' in a lawsuit to which she was never properly a party; (2) any assertions that she was in fact a party,

> despite the absence of formal notice of appearance, are negated by her failure and that of her counsel to appear or participate in pre-trial conferences; and (3) not withstanding any potential burden, Elaine Mott cannot now properly file a complaint arising from the events of June 30, 1983, because the applicable statute of limitations has run MCL 600.5805."
>
> William Mott and Elaine Mott v Gerald Kerns, et al,
> USDC ED SD Docket 84 CV 4180 DT
> Final Judgment of Dismissal of Elaine Mott, Honorable Barbara Hackett, January 20, 1987, p 6 (Pet. App. 18a)

Petitioner appealed her dismissal to the United States Court of Appeals for the Sixth Circuit.

On August 6, 1987, the United States Court of Appeals issued its Opinion. The Opinion concluded that sua sponte dismissal of Elaine Mott violated due process:

> "We reverse the decision of the district court and remand in order for plaintiff to have notice and an opportunity to be heard concerning her proposed dismissal from this action by the court."
> (Elaine Mott v Stamm and Kerns, U.S. Court of Appeals, Sixth Cirtuit, Docket

No. 87-1151, August 6, 1987, per curiam Opinion. (Pet. App. 13a)

On September 14, 1987, a hearing was held in the district court. The purpose of the hearing, as ordered by the U.S. Court of Appeals, was to determine Elaine Mott's role and/or participation in the case of William and Elaine Mott v Gerald C. Kerns, USDC ED SD Docket No. 84-CV-4180 DT. Prior to the hearing, the parties submitted briefs supporting their positions on Elaine Mott's conduct toward the case.

Petitioner testified at length during the hearing. The Court also heard testimony from Petitioner's attorney, John Bredell, from her alleged former attorney, Alan Hunt, from her husband, William Mott, and from William Mott's attorney, Sherman Sharpe. All described Appellant's participation (or lack thereof) during the Mott litigation.

At the conclusion of the three-hour evidentiary hearing, the district court concluded:

> "...Mrs. Mott, when called upon to participate, refused to do so. Not neglected to do so, but rather refused to do so. Nor did she take sufficient action to preserve her role in this until discovery was closed, one or two trial dates had passed, and it came to her attention possibly because of the matter in mediation that she might realize some dollars in this case. Notwithstanding -- not wanting her husband to prevail, it would seem that this record supports the finding that she then chose to go forward in her own behalf, but she did so well beyond the time the statute would allow her to do so.
>
> * * *
>
> "Having carefully reviewed this -- and I assure you I read this again before I came on the bench -- having listened carefully to you for almost three hours, the record is now before me, and weighing the credibility of the parties I must find that Mrs. Mott is not properly in this law suit."
>
> Transcript of Hearing, William and Elaine Mott v Gerald Kerns, et al, USDC ED No. 84-CV-4180 DT, September 14, 1987, pp 124-125. (Pet. App. 9a)

In essence, the district court concluded, after hearing the evidence submitted by the parties, that Elaine Mott was aware of the lawsuit between 1984 and 1986, but simply refused to participate in it.

An Order of Dismissal With Prejudice as to Plaintiff Elaine Mott was entered October 28, 1987. Dr. Mott's case proceeded to trial in November, 1987. After a month long jury trial, during which all aspects of Respondents' conduct were examined, a jury returned a verdict of no cause for action.

Petitioner again appealed her dismissal to the United States Court of Appeals. The Court of Appeals affirmed dismissal. Rehearing en banc was denied by the United States Court of Appeals on December 30, 1988. The instant Petition followed.

COUNTERSTATEMENT OF UNDERLYING FACTS

Appellant's statement of facts describes her version of the facts underlying this appeal. Appellees disagree with Appellant on the events of June 20, 1983. The following is an accurate description of events surrounding Appellant's alleged injury:

This case relates to a traffic stop in Van Buren County, Paw Paw, Michigan on June 20, 1983 at 1:00 a.m. As a result of the traffic stop, Petitioner was charged with carrying a concealed weapon.

At Petitioner's Preliminary Examination on charges of carrying a concealed weapon, Respondent Kerns testified that the Troopers' attention turned to Petitioner's van upon observing it traveling in excess of the 55 miles per hour speed limit. Mr. Mott

admitted at the preliminary examination that his speed was between 55 and 60 miles per hour when he was stopped. The Troopers observed Petitioner's van pass a semi-truck. After it passed the truck, the van moved from the left lane directly across the right lane and onto the right shoulder. At the preliminary examination, Respondents testified that the van then veered left again and crossed the centerline. Respondent Troopers testified the van finally moved right again, crossed the right lane and once again went over the white shoulder line of the freeway.

William Mott disputed the improper lane usage testimony but was found guilty of the infraction at a formal hearing held concommitantly with his preliminary examination.

Respondent Kerns testified at the

Preliminary Examination that he approached the passenger side of the van, he shined his flashlight into the van and observed a 12 ounce Miller Lite beer can near the driver's seat. Respondent Kerns informed his partner of possible open intoxicants. Respondent Stamm testified that as he spoke to Mr. Mott he detected the odor of alcohol. Respondent Stamm testified that when he heard his partner comment on open intoxicants he asked Mr. Mott to step from the van so he could obtain a better view of the passenger area.

Trooper Stamm testified that he reached into the passenger area and found the beer can illuminated by Kerns' flashlight. He then observed a second can of beer near the passenger seat which he found to contain a small amount of beer. He confirmed this liquid as beer by smelling and observing it.

William Mott admitted during his deposition that there were Miller Lite beer cans in the car near the driver's seat.

Respondent Stamm testified that after he found the second can he observed a purse-like pouch of sufficient size to contain several cans of beer. This pouch was between the driver's seat and the front passenger seat. He unzipped the pouch and found a loaded .38 caliber revolver in the pouch on top of other items.

Respondent Stamm seized the weapon, exited the vehicle and placed William Mott under arrest. Respondent Kerns placed Petitioner under arrest. Neither Petitioner nor her husband possessed a license to carry a concealed weapon as required by Michigan law.

REASONS FOR DENYING THE WRIT

Petitioner's civil rights action was dismissed pursuant to FR Civ P 41(b). The rule permits dismissai for "failure to prosecute or to comply with [the federal rules] or any order of the Court." Dismissal was also appropriate under Link v Wabash R Co, 370 US 626; 82 S Ct 1386; 8 L Ed 2d 734 (1962). In Link, this Court upheld a sua sponte dismissal with prejudice. A district court ordered dismissal when Link's attorney neglected to appear for a scheduled pre-trial conference. This Court, per Justice Harlan, discussed the inherent authority of a federal district judge when neglect is apparent:

> "The authority of a federal court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending

> cases and to avoid congestion in the calendars of the district courts. The power is of ancient origin, having its roots in judgments of non-suit and non prosquitur entered at common law ... and dismissals for want of prosecution of bills in equity ..."
> Link, supra, 370 US 629.

Clearly, based on the foregoing analysis, the district court enjoyed full authority to dismiss Petitioner's claim.

Petitioner suggests the district court found no evidence to support dismissal. Her argument is without merit. The district court found not only a failure to prosecute, but a willful refusal to proceed in the face of repeated requests by the other parties in the litigation:

> "Mrs. Mott, when called upon to participate, refused to do so. Not neglected to do so, but rather refused to do so. Nor did she take sufficient action to preserve her role in this until discovery was closed, one or two trial dates had passed, and it came to her attention possibly because of the matter in mediation that she might realize some dollars in this case.

> Notwithstanding -- not wanting her husband to prevail, it would seem that this record supports the finding that she then chose to go forward in her own behalf, but she did so well beyond the time the statute would allow her to do so."
>
> Transcript of hearing, William and Elaine Mott v Gerald Kerns, et al, USDC ED Docket No. 84-CV-4180 DT September 14, 1987, pp 124-125 (Pet. App. 9a)

Petitioner also questions whether the courts below employed appropriate standards in considering her conduct. The discussion above establishes the district court applied appropriate standards created in the Federal Rules of Civil Procedure and Link v Wabash, supra. The district court was also aware, on remand, of a requirement that "the harsh sanction" of dismissal may only be based on a clear record of delay or contumacious conduct (See Carter v City of Memphis, Tennessee, 636 F2d 159, 161 [CA 6, 1980]).

Likewise, the United States Court of Appeals for the Sixth Circuit employed the appropriate standard of reviewing the dismissal. The Sixth Circuit stated:

> "Although the dismissal of a party should only occur in circumstances in which the party - rather than the party's attorney - fails to prosecute a claim, Carter v City of Memphis, Tennessee, 636 F2d 159, 161 (CA 6, 1980), we find that the district court did not abuse its discretion in dismissing Mrs. Mott from this civil rights action. Although we originally remanded this case to the district court to determine whether Mrs. Mott ratified the actions of the attorney who originally filed the case, the evidence presented to the district court clearly indicates that Mrs. Mott failed to actively and timely prosecute her claim. Therefore, regardless of whether she ratified this lawsuit, we find the district court did not abuse its discretion in dismissing Mrs. Mott's claim for her failure to prosecute it."
>
> Opinion, Mott v Kerns, et al,
> USCA 6 Docket No. 87-2112
> November 10, 1988, p 3 (Pet. App. 3a-4a)

Petitioner attempts to couch her Petition for Writ of Certiorari in Fifth

Amendment due process terms. Petitioner's legal position ignores the factual history of this case. Respondents contend Petitioner received the process due her under the federal Constitution. In her first appeal to the United States Court of Appeals, she requested remand for a district court due process hearing on her conduct in the litigation. The Sixth Circuit accommodated this request. A three-hour evidentiary hearing was held in the district court. Petitioner received notice, attended the hearing, presented argument, witnesses, and documentary evidence. All witnesses with knowledge of the circumstances appeared and were heard. At the conclusion of the hearing, the district court issued a verbal opinion, again dismissing Petitioner from the litigation. The verbal opinion was followed by a written order repeating the

district court's factual and legal conclusions. Thereafter, Petitioner availed herself of a second appeal to the United States Court of Appeals. While Petitioner may disagree with the outcome of these proceedings, there is no evidence to suggest a violation of due process principles.

Review in this forum is inappropriate. This case involves no dispute between the circuits. Nor is there a genuine due process issue involved. Indeed, the conduct of the lower courts in this case was in accordance with the Federal Rules of Civil Procedure and case law created by this Court.

RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, Respondents respectfully request this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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